U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

John L. Mica
Ranking Republican Member

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

James W. Coon II, Republican Chief of Staff

May 5, 2010

The Honorable Christine A. Varney
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
450 5th St. NW
Washington, DC 20530

Dear Ms. Varney:

I strongly urge the Department of Justice to demonstrate its commitment to vigorous antitrust enforcement and healthy competition in the airline industry by disapproving the proposed merger between United Air Lines and Continental Airlines.

If allowed to proceed, this merger will move the country far down the path of an airline system dominated by three mega-carriers. This path began with the approval of the Delta-Northwest merger in 2008, which I warned would create great pressure for other large airlines to merge. Now my fears are being realized, with the announcement of the proposed United-Continental merger.

We cannot allow the reduction of the airline industry to three large carriers. In this environment, the carriers will concentrate their efforts on fortress hubs and on the routes they dominate. There will be strong incentives to refrain from competition. There will be less service, and fares will rise. This is the antithesis of the structure Congress anticipated when we deregulated the industry in 1978. The situation will be worsened by the trend towards placing international service largely in the hands of three major alliances whose members have antitrust immunity. These alliances, protected by immunity from antitrust laws, have every incentive to refrain from competing on service and fares.

Entirely apart from the effect of the United-Continental merger in encouraging other mergers, the merger itself presents problems. The two carriers' networks overlap on 13 routes between some of America's largest markets: the New York metropolitan area; Washington, D.C.; San Francisco; Los Angeles; Denver; Houston; Chicago; and Cleveland, among others. The two carriers also compete in a number of international markets.

The Department of Justice has already expressed its concerns over a reduction in competition between United and Continental. Last year, United and Continental applied for antitrust immunity to collaborate on service and fares in a large number of international markets. In

antitrust immunity to collaborate on service and fares in a large number of international markets. In its comments on the application to Department of Transportation, the Antitrust Division expressed serious reservations about immunity in many of the markets. The Antitrust Division observed that allowing the carriers to collaborate on service and fares on international routes – particularly those to Canada, South America, and limited-entry Asian markets such as Beijing – would substantially reduce competition and increase fares. The Justice Department's comments on the carriers' application concluded that:

> "fares are likely to increase by roughly 15% on routes where the number of nonstop competitors decreases from two to one, and by roughly 6% on routes where the number of nonstop competitors decreases from three to two. Competition will be significantly diminished in limited entry markets such as China, where United and Continental today present the best, and in some cases, only service alternatives. Domestic competition between United and Continental may also be affected."

The Department argued that antitrust immunity should not be awarded in a number of the international markets served by United and Continental. In response to the Justice Department's concerns, the Department of Transportation carved many of these markets out of the immunity awarded. If antitrust immunity for these markets is unacceptable, how can we now accept a merger that would have at least the same effects as antitrust immunity in reducing competition in important markets?

If United and Continental merge, another domino in a chain of mergers will fall, and there will be strong pressure for further consolidation. As I predicted when I wrote your predecessor in 2008 on the Delta-Northwest merger, approval of that merger created conditions that have persuaded Delta's competitors to pursue their own combinations. The United-Continental transaction is the latest, but it likely will not be the last. If the United-Continental transaction goes forward, American Airlines, which until the Delta-Northwest merger was the largest U.S. carrier, will likely feel strong pressure to merge. US Airways, the only remaining medium-sized network carrier and a frequent subject of prospective consolidation activity, is a likely target. Although some might argue that the presence of low-cost carriers in certain markets would offset historical regulatory concerns associated with mergers, I caution against an over-reliance on the theoretical mitigating effects of low-cost carriers. Low-cost carriers do not serve many of the same markets served by large network carriers and, in fact, have expressed their own interest in participating in consolidation activity, according to recent media reports.

A series of airline mergers will reshape our airline system and be the death knell of deregulation. As I remarked during a 2008 House Aviation Subcommittee hearing on airline consolidation, "Reducing the airline industry as a whole sector of aviation to three major carriers substantially will reduce competition, will limit consumer choice and result in higher fares." With one large-scale merger behind us and with the United-Continental announcement, I reaffirm these concerns.

When it reviews this merger, the Justice Department should consider not only the merger itself, but also the merger's "downstream" effects: the possibility that, if this merger is approved,

other carriers will be forced to merge to stay competitive. I am pleased to note that your predecessor agreed with this approach. When Assistant Attorney General James H. O'Connell, Jr., testified at the Aviation Subcommittee's 2008 hearing, I asked, "Isn't it reasonable for the Justice Department to give consideration to the consequences to the marketplace of a merger of carriers of this dimension, this magnitude and the cascade of actions that will take place in its wake?" Mr. O'Connell responded: "Mr. Chairman, yes, and that is something that we do look at. When we look at individual markets to determine the effect of a transaction in a marketplace, we look at all available information."

Of course, this is not the first time United has proposed a combination that raises substantial concerns about the health of competition. The last time the Justice Department had occasion to review a United proposal for an all-out merger, in 2001, the Department concluded United's proposal to merge with US Airways presented such significant antitrust concerns that the Department announced its intention to file a lawsuit to prevent the transaction from going forward. As you know, in response to the Department's decision to file a lawsuit, United and US Airways properly shelved their plans to merge.

As evidenced by the Justice Department's position on the United-US Airways merger, the Antitrust Division has a long history of preserving competition. In 1998, the Antitrust Division filed suit to prevent Northwest's acquisition of a controlling share of Continental Airline's stock, noting that "the acquisition would diminish substantially both Northwest's and Continental's incentives to compete against each other" on several hub and non-hub routes, as well as limit new entry into the hub markets. As a result of this lawsuit, Northwest sold shares of Continental that would have given it control and retained only a five percent share.

Regrettably, the Division departed from its policy of preventing anticompetitive activity when it approved the Delta-Northwest merger. But the Justice Department's recent comments on the United-Continental application for antitrust immunity, as well as comments on other carriers' applications for the same legal privilege, show a renewed sensitivity to the importance of competition. I am confident that your office will apply the spirit of vigorous antitrust enforcement to disapprove the United-Continental merger.

Some airline executives contend that the viability of the airline industry depends on consolidation. The available evidence does not support these assertions. Even Continental's former chief executive officer, Larry Kellner, himself has made statements that raise more than a specter of doubt about the wisdom of a merger. Mr. Kellner, who presided over Continental's recent integration into the Star Alliance and entry into the immunized joint business venture with United, has recognized in publicly quoted comments that few airline mergers are successful. He told a reporter with the trade publication FlightGlobal during an interview published Oct. 27, 2009, that it is difficult to find a merger that has worked in the airline business or has led observers to say, "'[W]ow[,] that merger changed things.'"[1] Moreover, Mr. Kellner said on a conference call with stock market analysts to discuss Continental's 2009 third-quarter results that, "Again, there are just a number of things that aren't predictable in our business that go up and down. As you look at a little

[1] Lori Ranson, *Smisek and Kellner, on Guiding Continental's Move to the Star Alliance,* FlightGlobal (Oct. 27, 2009).

capacity come out [sic], things get better and then some capacity comes back in. I'm not sure consolidation solves that . . . . If you look back to the mid [19]80s there were articles talking about, how consolidation could solve that."[2]

I trust that your office will subject the proposed United-Continental transaction to thorough review and will rigorously examine whether the airlines can meet their burden of demonstrating that the merger is consistent with antitrust principles in the best interests of the traveling public. I urge the Department's analysis to include consideration of the following factors in addition to the panoply of factors considered as a matter of course:

- Whether the transaction presents a reasonable possibility that further consolidation activity among competing carriers will follow;

- Whether, to avail itself of the potential benefits of the transaction, the combined carrier is likely to substantially eliminate capacity in such a way as to eliminate travel options between any city-pairs; and

- Whether the transaction would alter the structure of the U.S. airline industry in such a way as to permit the three largest carriers to create or enhance market power or to facilitate its exercise in either the domestic or the international marketplace.

I ask that your office give my concerns full consideration when evaluating a transaction that could have major and lasting consequences for American consumers. I am confident that after this review you will conclude that the merger should not be approved.

With all best wishes,

Sincerely,

James L. Oberstar

James L. Oberstar, MC
Chairman

---

[2] Seeking Alpha, *Continental Airlines Inc. Q3 2009 Earnings Call Transcript* (Oct. 21, 2009), *available at* http: http://seekingalpha.com/article/167939-continental-airlines-inc-q3-2009-earnings-call-transcript?page=-1&find=consolidation.